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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 185

WILLIS ATTOCKNIE,
Petitioner,

VERSUS

STEWART L. UDALL, Secretary of the Interior,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June, 1968

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

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In the
Supreme Court of the United States
OCTOBER TERM, 1967

No. .....

WILLIS ATTOCKNIE,
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VERSUS

STEWART L. UDALL, Secretary of the Interior,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Durward McDaniel, attorney for Willis Attocknie, petitioner herein, respectfully requests in his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on March 14, 1968.

CITATIONS TO OPINIONS BELOW

The report of the District Court decision in this matter, *Attocknie* v. *Udall*, D.C. Okla. 1966, 261 F.Supp. 876, is set out *infra* in the Appendix hereto at pages xvi-xxix. The opinion of the Circuit Court of Appeals is unreported; it is printed in the Appendix hereto at pages xxvi-xxxv.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

This Court is requested to grant a writ of certiorari because the Court of Appeals for the Tenth Circuit has rendered a decision in conflict with decisions of the Court of Appeals for the District of Columbia Circuit, and of the United States Supreme Court as to whether judicial review can be given, under authority of 5 U.S.C. § 702, of the approval or disapproval of a will made by an Indian pursuant to the authority granted in 25 U.S.C. § 373. A judgment was rendered on March 14, 1968, in this matter by the United States Court of Appeals for the Tenth Circuit, and said order was entered on the 14th day of March, 1968.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

The question herein presented is:

Is a decision of the Secretary of the Interior approving or disapproving the will of an Indian made pursuant to 25 U.S.C. § 373 subject to review under the authority of 5 U.S.C. § 702?

STATUTES INVOLVED

Title 5 U.S.C. § 702:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Title 25 U.S.C. § 373:

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless or until it shall have been approved by the Secretary of the Interior: * * *."

STATEMENT OF THE CASE

Petitioner brought this action to review and set aside an order of respondent, Stewart L. Udall, Secretary of the Interior, as well as for a declaratory judgment and for injunctive relief.

The order challenged arose in the following manner. On August 1, 1961, Albert Attocknie, a Comanche Indian, who was then 82 years old, made a will bequeathing his property to four of his children and declaring, "I am leaving nothing to Willis Attocknie because he is not my son." After a hearing, the Examiner of Inheritance made an order on May 3, 1963, approving the will and directing distribution of the estate accordingly, but also making the finding that Willis Attocknie was the son of the decedent. Willis Attocknie, appearing at the hearing of April 11, 1963, without counsel, raised the questions of undue influence and testamentary capacity. In his petition for rehearing, filed July

2, 1963, Willis Attocknie raised the questions of lack of testamentary capacity and insane delusion. A rehearing was conducted by the Examiner of Inheritance on June 26, 1964, at which time this petitioner presented the testimony of eight witnesses and the proponents of the will presented their witnesses. At that time the petitioner was assured by the Examiner of Inheritance that he would be allowed on a later date an opportunity to cross-examine the witnesses on the will and to present further medical testimony. No other hearing was permitted. The petitioner was permitted by the Examiner of Inheritance to file an offer of proof. On January 29, 1965, the Examiner of Inheritance affirmed his original order, finding in addition that there was no insane delusion on the part of the testator. This petitioner then appealed to the Secretary of the Interior. Two of the proponents also appealed to the Secretary of the Interior from the finding that this petitioner was the son of the testator. On February 7, 1966, the Secretary of the Interior affirmed the findings and decisions of the Examiner of Inheritance, and this petitioner then petitioned the United States District Court for judicial review pursuant to the Administrative Procedure Act.

By memorandum opinion filed December 27, 1966, and by judgment filed January 10, 1967, the Judge of the United States District Court for the Western District of Oklahoma overruled this petitioner's motion for summary judgment and sustained the respondent's motion for summary judgment. The memorandum opinion affirmed the findings of fact and conclusions of law and the orders and decisions of the Secretary of the Interior.

The petitioner appealed the decision of the District Court to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals, following its decision in the case of *Heffelman* v. *Udall,* 378 F.2d 109 (10th Cir.), which held that judicial review of an administrative decision relating to the distribution of an Indian's allotted trust estate was not permitted under the Administrative Procedure Act, reversed the case and remanded it to the District Court with directions that the cause be dismissed for lack of jurisdiction. Petitioner requests this Court to grant a writ of certiorari to review the decision of the Court of Appeals in this case.

REASONS FOR ALLOWANCE OF WRIT

The decision rendered herein by the Court of Appeals for the Tenth Circuit is in conflict with two decisions made by the Court of Appeals for the District of Columbia Circuit. In *Homovich* v. *Chapman,* 191 F.2d 761 (1951), the District of Columbia Circuit Court held that decisions by the Secretary of the Interior with regard to wills pursuant to 25 U.S.C. § 373 were subject to judicial review under the Administrative Procedure Act. In a later decision involving an Indian will under this statute, *Asenap* v. *Huff,* 312 F.2d 358 (1962), the Court of Appeals for the District of Columbia Circuit remanded the case to the District Court with directions that the decision of the Secretary of the Interior approving the will be allowed to stand, stating that its examination of the record convinced the Court that the decision of the Secretary was not arbitrary and capricious. In two different cases, therefore, the Court of Appeals for the District of Columbia Circuit has taken jurisdiction to

review decisions of the Secretary of the Interior relative to approval of wills pursuant to 25 U.S.C. § 373.

Furthermore, the decision of the Tenth Circuit Court in the instant case is inconsistent with *Blanset* v. *Cardin, et al.*, 261 Fed. 309, wherein the decision of the Secretary of the Interior was reviewed in an Indian will case under the same statute, 25 U.S.C. § 373. Moreover, the *Blanset* case arose long before the enactment of the Administrative Procedure Act, which enlarged the scope of review of agency actions. In its review of *Blanset* v. *Cardin* the United States Supreme Court also did not deny the reviewability of the decisions of the Secretary of the Interior. *Blanset* v. *Cardin*, 41 S.Ct. 519, 256 U.S. 319. Therefore, the decision of the Tenth Circuit Court of Appeals in the instant case is inconsistent not only with opinions of other courts of appeals but also is in conflict with the decision of the United States Supreme Court in the *Blanset* v. *Cardin* case.

Wherefore, your petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case.

Respectfully submitted,

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Attorneys for Petitioner

June, 1968

APPENDIX

[November 9, 1962]

UNITED STATES — Probate
DEPARTMENT OF THE INTERIOR — H-289-62
Office of the Solicitor
Office of the Examiner of Inheritance — KRB
P. O. Box 366, Shawnee, Oklahoma

IN THE MATTER OF THE ESTATE OF:	)	
Melvin (Charles) Quapaw, deceased Quapaw Unallottee	)	ORDER APPROVING WILL AND DECREEING DISTRIBUTION

This case coming on to be heard before the Examiner of Inheritance, Office of the Solicitor, Shawnee, Oklahoma, and upon the submission of the evidence, the following facts and conclusions of law are presented:

Notices of hearing in this estate were duly served upon the known heirs, devisees and other interested persons by mailing a copy of such notices to each of them at their last known addresses, and by posting a notice at five public places within the jurisdiction of the Quapaw Area Field Office of the Bureau of Indian Affairs in Oklahoma for 20 days or more prior to such hearing. Notices of a supplemental hearing at Tulsa, Oklahoma, on September 11, 1962, were mailed to the heirs, devisees and other interested parties at their last known addresses on August 21, 1962.

A hearing was duly concluded at Tulsa, Oklahoma, on September 11, 1962, for the purpose of ascertaining the heirs at law of the decedent and the facts and circumstances surrounding the execution of an instrument in writing, dated January 7, 1949, purporting to be his last will and testament.

The evidence adduced at the hearings discloses that the decedent died on January 5, 1962, at the age of 46 years, a resident of the State of Oklahoma, leaving surviving him

the following heirs at law, determined in accordance with the laws of the State of Oklahoma, whose shares in the estate, had he died intestate, would be:

Alverta (Elverta) Quapaw, Otoe Unal.,	wife,	1/2
Myron Dennis Quapaw, Quapaw Unal.,	son,	1/2

The decedent's trust or restricted property consists of fractional interests in six Quapaw allotments, and one Eastern Shawnee allotment, all of which are hereinafter described, and are situated in Oklahoma under the jurisdiction of the Quapaw Area Field Office of the Bureau of Indian Affairs, Miami, Oklahoma.

By the terms of the decedent's last will and testament, he leaves all of his estate to his wife, Elverta Quapaw, excepting the sum of $1.00 which he leaves to Myron Dennis Quapaw. In this will he also denies that he is the father of Myron Dennis Quapaw.

Objection to the approval of this will was made upon the grounds that the decedent was suffering from an insane delusion, affecting his testamentary capacity, in denying the paternity of Myron Dennis Quapaw. The Supreme Court of Oklahoma followed the rule as in most other states in defining an insane delusion in the case of Winn v. Dolezal (Okl.) 355 P. 2d 859, in its Syllabus:

> "An 'insane delusion', within the rule invalidating will, denotes a false belief, which would be incredible in the same circumstance to victim thereof were he of sound mind and from which he cannot be dissuaded by evidence or argument."

The contestant's evidence is short, simple and unrefuted. Mildred Frances Turley married the decedent by ceremony on April 16, 1935. On January 25, 1936, Myron Dennis Quapaw was born. When these parties were divorced on August 14, 1937, the contestant was found to be a child of this marriage, and the decedent was ordered to pay $25.00 per month child support payments to the mother. These pay-

ments were apparently made with reasonable regularity through 1955. Myron Dennis Quapaw testified that the decedent was his father, but that he did not see him or visit with him since the boy started to school at the age of five or six years.

It would take a fertile imagination to find an insane delusion from this evidence. Under Section 1 of Title 10 of the Oklahoma Statutes, the decedent was presumed to be the father of this boy. Since the decedent did or may have had access to the mother during the time the child was begotten, the presumption was virtually conclusive, Secondine vs. Secondine (Okl.) 311 P. 2d 215. Thus, the subsequent divorce and child support payments were neither an admission nor indication of paternity on the part of the decedent. They were the natural result of the laws of the State of Oklahoma and a mother with a small minor child to support. On no conceivable grounds could the decedent have successfully contested the paternity of the child in the divorce proceedings. As he found out on those occasions when he failed to pay the child support ordered by the court, he had little or no choice in this matter either.

The contestant claims the case of Robertson v. Robertson, 199 Okl. 582, 189 P. 2d 615, supports his position in this estate. Further, he points out that the surviving widow offered no evidence to support the basis or reasonableness of the views expressed in this will. On the latter point, common sense indicates the facts as testified to by Alverta Quapaw. The decedent did not discuss his previous marriage in detail with her, nor did he discuss the paternity of this child. At no point during the supplemental hearing, did any burden of proof ever shift to this lady to explain or justify her husband's views. He, alone, was in a singular position to form a valid opinion in his own mind as to the paternity of Myron Dennis Quapaw, irrespective of whether he had been married to the boy's mother nine months or nine years. Nothing presented gives the slightest indication that such opinion was "incredible" or the product of an unsound mind.

Returning to the Robertson case, the facts there are entirely different. In that case, the will stated flatly that the decedent had no children, living or deceased. Thus, the mere proof that he did have children which he knew about, or should have known about, would be sufficient to raise a serious question as to his mental capacity. In the present case, the same proof would only establish what was already presumed by law, and obviously considered by the decedent when this will was prepared. It does not show an unsound mind.

Neither the contestant nor his counsel raised any other objection to the will, nor have they indicated any desire to take the testimony of the surviving attesting witness. One of the attesting witnesses is deceased, and the surviving witness resides in Sacaton, Arizona. Their affidavits made at the time the will was executed, plus a subsequent affidavit of the surviving witness, made on September 18, 1962, show that the will was properly made and executed by the decedent when he was of sound and disposing mind and memory, and not acting under undue influence, fraud, duress or coercion.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 1 of the Act of June 25, 1910 (36 Stat. 855), and other applicable statutes, and pursuant to 25 C. F. R. 15, I hereby approve the decedent's last will and testament, dated January 7, 1949.

IT IS ORDERED, that the Area Director will cause to be made a distribution of the trust or restricted estate of the decedent in accordance with his last will and testament, subject to payment of the probate fee and allowed claims, as follows:

To Myron Quapaw, Quapaw Unallottee, son and legatee, the following:

The sum of One Dollar ($1.00).

To Alverta (Elverta) Quapaw, Otoe Unallottee, wife, devisee and residuary beneficiary, the following:

An undivided 1/396 interest in that part of the allotment of Sa-pa-ta-wa-se (Flint), Eastern Shawnee #65, described as the E/2 NW/4 SW/4 & SW/4 SW/4 Sec. 1-27N-24 E., I. M., in Oklahoma, containing 60 acres.

An undivided 1/6 interest in that part of the allotment of Peter Clabber, Quapaw #81, described as the NW/4 SE/4 Sec. 6-28N-24 E., I. M., in Oklahoma, containing 40 acres.

An undivided 1/6 interest in that part of the allotment of Meh-het-tah Clabber, Quapaw #82, described as the SW/4 SE/4 Sec. 6-28N-24 E., I. M., in Oklahoma, containing 40 acres.

An undivided 2/27 interest in that part of the allotment of Sig-dah Track, Quapaw #138-149, described as the S/2 SE/4 & SE/4 SW/4 Sec. 2-28N-23 E., I. M. (less 0.84 acres right of way), in Oklahoma, containing 119.16 acres.

An undivided 1/144 interest in that part of the allotment of Hah-win-nah-zhe Stanley, Quapaw #182/197, described as SE/4 NW/4 Sec. 29-29N-25 E., I. M., in Oklahoma, containing 40 acres.

An undivided 1/12 interest in the allotment of Willie Buffalo Thompson, Quapaw #226-A, described as the SE/4 & SE/4 SW/4 Sec. 24-29N-24 E., I. M., in Oklahoma, containing 200 acres.

An undivided 15/1440 interest in the allotment of Slim Jim, Quapaw #185-201, described as the SW/4 NW/4 Sec. 17-29N-23 E., I. M., and S/2 NE/4 & N/2 SE/4 Sec. 20-29N-23 E., I. M., in Oklahoma, containing 200 acres, and

Lot 4 of NW/4 Sec. 17-29N-23 E., I. M.; Lot 1 of NE/4 Sec. 18-29N-23 E., I. M.; Lot 1 of NE/4 Sec. 27-29N-22 E., I. M.; Lot 3 of SE/4 Sec. 29-29N-25 E., I. M.; and Lot 4 of NE/4 Sec. 18-29N-25 E., I. M., all in Oklahoma, containing 40.01 acres.

Any and all other trust property, real, personal or mixed, not otherwise disposed of under the terms of the will, if any there be.

The following claims are hereby allowed and are to be paid in the order listed below from funds now held or hereafter accruing to the credit of the estate, subject to payment of the probate fee:

1. Cooper Funeral Home, 5 B Northwest, Miami, Oklahoma, in the amount of $250.00, covering that portion of the decedent's funeral expenses having a preferred status, under 25 C. F. R. 15.25.
2. Miami Baptist Hospital, Miami, Oklahoma, in the amount of $111.05, covering hospital and medical services rendered the decedent during his last illness.
3. Cooper Funeral Home, 5 B Northwest, Miami, Oklahoma, in the amount of $260.00, covering the balance due on the decedent's funeral expenses.

The trust or restricted estate of the decedent having been appraised at $4,127.87, a probate fee of $50.00 will be collected by the Area Director or other officer in charge in accordance with the authority found in the Act of January 24, 1923 (42 Stat. 1185).

Done at the City of Shawnee, Oklahoma, and dated November 9, 1962.

(SGD) KENT R. BLAINE

Kent R. Blaine
Examiner of Inheritance

[January 29, 1965]

Probate
H-137-63
H-13-65
KRB

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Office of the Examiner of Inheritance
Oil and Gas Building
1500 North Kickapoo Street
Shawnee, Oklahoma 74801

IN THE MATTER OF THE ESTATE OF:	)	ORDER AFFIRMING
Albert Attocknie, deceased	)	ORIGINAL DECISION
Comanche Allottee #532	)	AFTER REHEARING

The above-named decedent's last will and testament was approved by the undersigned on May 3, 1963, Probate #H-137-63. Thereafter, on July 2, 1963, Willis Attocknie, Sr. filed a petition for rehearing asserting that the decedent was mentally incompetent to make a valid last will and testament on August 1, 1961, because he was suffering from an "insane delusion" that the petitioner was not his son. Neither this petitioner nor any of the evidence suggests any other possible manifestation of mental incompetency.

After due consideration, this petition was granted, and a rehearing was held at Anadarko, Oklahoma, on June 29, 1964. Only a brief statement is needed to cover all the evidence, admissible or otherwise, which the petitioner has presented. Willis Attocknie, Sr. contends that when he was young, the decedent considered him as a son, and treated him as a son including public acknowledgment of paternity. Subsequently, at some undetermined time, the decedent changed his views, without justification or explanation, and took the position that he was not the father of Willis Attocknie, Sr. Further, the petitioner would show that the testator was in ill health during the last part of his life, and suffered from what is commonly called "Parkinson's disease."

The beneficiaries under the decedent's will take the position that their father, the decedent, consistently denied that he was the father of the petitioner, and his statement to that effect in the will only confirms his earlier views on the matter.

Prior to further reference to the facts involved, the law applicable to this "insane delusion" matter insofar as it affected the will should be clarified. The following definition given by the Supreme Court of Oklahoma in the case of Winn v. Dolezal, (Okl.) 355 P. 2d 859, is clear and applicable:

> "An 'insane delusion', within the rule invalidating will, denotes a false belief, which would be incredible in the same circumstance to victim thereof were he of sound mind and from which he cannot be dissuaded by any evidence or argument."

Nothing could be clearer or simpler than this rule; an insane delusion is not merely an erroneous belief. The belief must not only be wrong, it must be unreasonable. It must defy rational explanation or justification. Stated another way, it must be such that only a person with a deranged or abnormal mind would believe that the "insane delusion" represented the truth or was correct.

In reality, the petitioner's entire case rests on only the following language in the will: "I am leaving nothing to Willis Attocknie because he is not my son," plus the original findings in these proceedings that Willis Attocknie, Sr. was a son of the testator. After an extensive rehearing, no evidence has been found which sheds any additional light on this question. While the petitioner attempted to shift the burden of proof to the proponents of the will to explain a purported change of attitude by the testator, this added nothing to his objection to the will. The undersigned does not know, and is not interested in determining if the decedent's views changed during his life on this paternity

question. It is immaterial and, does not, in any way, reflect adversely on the decedent's mental capacity, or suggest that he was suffering from an insane delusion. In the absence of proof of a recognized marriage between the parents of Willis Attocknie, Sr., there are no presumptions of paternity involved here. The decedent was free to change his views any number of times on this paternity question for a multitude of reasons which would be plausible, reasonable and understandable. Thus, proof of a change of attitude is not even evidence of an insane delusion.

Further, it is equally absurd to suggest that the inconsistency between the language in the will and the original findings of fact tends to prove an "insane delusion." If all of the evidence had been clear and unequivocal that Willis Attocknie, Sr. was the decedent's son, this might cause one to look more carefully at the reasons for the testator's views. However, this is not the case, the original findings of paternity are based on highly disputed evidence, and there were a substantial number of witnesses who did not believe that this relationship existed. A finding that the petitioner was not a son of this decedent could, in my opinion, be sustained by the evidence now in the record. Under these circumstances the petitioner has failed to prove the first basic element of an "insane delusion." He has failed to establish a false belief. When, as in this case, there is good reason for an honest difference of opinion on facts that are extremely difficult to establish, no single conclusion by any one person is sufficient to hold that opposing views are "false." There are innumerable reasons which are logical, understandable and sensible for the testator's beliefs as to the paternity of Willis Attocknie, Sr.

If, as indicated above, the petitioner has completely failed to prove that the testator's belief was false, there seems to be no useful purpose in exploring the possibility that it was the product of an unsound mind. There is no other evidence whatsoever of lack of mental capacity to

make a will at the time this instrument was executed. The evidence, taken in its entirety, fails to even suggest mental abnormality or an insane delusion.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 1 of the Act of June 25, 1910 (36 Stat. 855), and other applicable statutes, and pursuant to 25 C. F. R. 15, for the foregoing reasons, I hereby find that there is no evidence whatsoever that the decedent lacked the mental capacity to make a last will and testament on August 1, 1961, nor that he was suffering from an insane delusion in believing that Willis Attocknie, Sr. was not his son. Pursuant to this same authority; therefore, I hereby affirm the original decision dated May 3, 1963, in all respects including the approval of the decedent's last will and testament.

This action on the petition for rehearing becomes final sixty (60) days from the date hereof. The petitioner may within this 60 day period (or within such additional period as the Secretary, for good cause, may allow) file with the Area Field Representative, Bureau of Indian Affairs, Anadarko Agency, Anadarko, Oklahoma, a written notice of appeal to the Secretary of the Interior. Such notice of appeal shall state specifically and concisely the reasons for the appeal. Copies of the notice of appeal shall be furnished by the appellant to the Examiner of Inheritance and to all parties who share in the estate under the decision of the Examiner, and the notice of appeal shall contain a certification stating that this has been done.

Done at the City of Shawnee, Oklahoma, and dated January 29, 1965.

(SGD) KENT R. BLAINE

Kent R. Blaine
Examiner of Inheritance

Copies to:

Southwest Title Plant, Bureau of Indian Affairs, Phoenix, Ariz.

Anadarko Agency, Anadarko, Okla.

I. I. M. Accounts Section, Anadarko, Okla.

Faith Attocknie (Blackowl), 516 East Georgia, Anadarko, Okla.

Ida Attocknie, 2236 N. W. 35th St., Oklahoma City, Okla.

Paul Attocknie, Box 111, Oklahoma City, Okla.

Francis Joseph Attocknie, 3224 S. Stultz, Oklahoma City, Okla.

Willis Attocknie, Sr., 1408 S. 10th St., Lawton, Okla.

Mr. Durward McDaniel, Attorney at Law, 305 Midwest Bldg., Oklahoma City, Okla.

Mr. Omer Luellen, Attorney at Law, Box 96, Hinton, Okla.

Mr. James E. Grigsby, Attorney at Law, 510 Hightower Bldg., Oklahoma City, Okla.

Mr. Almon E. Henson, Goode & Henson, Attorneys at Law, Federal National Bank Bldg., Shawnee, Okla.

[February 7, 1966]

In Reply Refer to:

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IA-1442

Estate of Albert Attocknie, deceased Comanche allottee No. 532	:	Probate H-137-63 KCA
	:	Order of a Hearing Examiner, affirming original decision after rehearing
	:	Affirmed

APPEAL FROM DECISION OF HEARING EXAMINER

Willis Attocknie, Sr., through counsel, appealed to the Secretary of the Interior from a decision of the Hearing Examiner, dated January 29, 1965, affirming the Examiner's original decision in the probate proceedings in the estate of Albert Attocknie, deceased Comanche allottee No. 532. Faith and Paul Attocknie, also through counsel, have filed a separate appeal in the proceedings.

The decedent, Albert Attocknie, died on December 5, 1962, approximately 80 years of age. The Hearing Examiner determined in his original decision, dated May 3, 1963, that the decedent died unmarried but left five children, including the three appellants. By his last will and testament, dated August 1, 1961, decedent devised and bequeathed his estate to four of his children, with the statement that "I am leaving nothing to Willis Attocknie because he is not my son." This will was approved by the Hearing Examiner, after which Willis Attocknie filed a petition for rehearing. A rehearing was granted, but the affirmance by the Examiner of his original decision prompted Willis Attocknie's appeal.

The appellant, Willis Attocknie, is contesting approval of the decedent's will. In substance, he claims that the Hearing Examiner arbitrarily refused to conduct additional hearings to permit the production of medical evidence relating to the health and testamentary capacity of the testator; that the decisions of the Examiner are contrary to the evidence, and are erroneous in not finding that decedent was incompetent to make a will; that decedent was unduly influenced, and that his will is void because of an insane delusion of decedent denying paternity of his natural child, Willis Attocknie. The appeal filed by Faith and Paul Attocknie, proponents of decedent's will, constitutes an objection to the Hearing Examiner's finding that the decedent was the father of Willis Attocknie. The decedent was not married to the mother of Willis at the time of his birth and his paternity was sharply disputed.

The allegation by the contestant, Willis Attocknie, that adequate opportunity was not afforded by the Examiner to present proof is unconvincing. As stated above, a rehearing was granted in this matter at which time comprehensive additional testimony was taken and proofs submitted by counsel on behalf of all interested parties. There was no indication at the close of the hearing that contestant had additional evidence to offer. While contestant made a later offer of proof, we see no error in the Examiner's not taking further testimony. It is within a Hearing Examiner's discretion to determine the number of witnesses and proofs he will entertain on a particular issue in a probate matter before him. We conclude that the Examiner here did not abuse his discretion in refusing to hold a third hearing. Like other litigation, Indian probate proceedings must come to an end.

No serious showing has been made to support the allegation of undue influence. Moreover, the record contains convincing proof, particularly from those who attended the decedent at or near the time of the execution of his will,

that he possessed general testamentary capacity and the ability to make a will.

On the question of the paternity of contestant and the assertion that decedent was laboring under an insane delusion with respect thereto, affecting his competency to make a will, the testimony presented by the opposing groups is conflicting and disputed. In similar circumstances on appeal, where the Hearing Examiner has had the opportunity to observe the witnesses and to evaluate their testimony directly, it has been the policy of this Department not to disturb the Examiner's conclusions upon controverted questions of fact.[1] We follow this policy in the present case.

Consideration of *In re Robertson's Estate,* 199 Okl. 582, 189 P. 2d 615 (1948), cited by contestant, does not convince us that the Examiner erred in ruling that the testator was not the victim of an insane delusion. The situation there is not comparable to that in the present case. In *Robertson* the decedent had been married to the mother of the children involved, two children were born of that marriage, and the record was replete with evidence that testator had children who were "conclusively" shown to be his. In fact, in that case no rational basis whatever existed for testator's statement that he had no children. On the other hand, consideration of the question of paternity in the case before us presented conflicting and contested testimony. While there is evidence in the present record to support the Examiner's

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[1] Estate of Elizabeth Chasing Hawk, IA-117 (January 6, 1954); Estate of Ko-tay (Stephen), IA-48 (September 10, 1951) Cf. *Winn* v. *Dolezal,* 355 P.2d 859 (Okl. 1960), where, in affirming favorable action on a will by the trial court, it was said: "Whether or not testator was laboring under an insane delusion that contestants were not his children is a question of fact. It is significant to note the County Judge in the original contest and the District Judge on hearing the contest de novo had the opportunity of observing and studying the witnesses on the stand; their candor or lack thereof; their apparent bias or prejudice and their general demeanor." (p. 862)

finding that the testator was the father of Willis Attocknie, the issue nevertheless was highly disputed. Because of this situation, and for the reasons given above regarding our practice in upholding a trial Examiner's findings in controverted factual situations, the Examiner's findings in the present case will not be disturbed.

Accordingly, and pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (3) (a), 24 F.R. 1348), and redelegated to the Associate Solicitor by the Solicitor (Solicitor's Regulation 19, 29 F.R. 6449), the above appeals are hereby dismissed and the Examiner's decisions are affirmed. Distribution of the estate may proceed on the basis of his decisions.

(signed) Richmond F. Allan
Richmond F. Allan
Associate Solicitor
Indian Affairs

ESTATE OF ALBERT ATTOCKNIE
Decided FEB 7 1966

IA-1442

Indian Lands: Descent and Distribution: Wills — Indians: Probate

Where the testimony in a probate proceeding is disputed and conflicting on the questions of paternity and of testator's competency to make a will, the factual findings of the Hearing Examiner, who had the opportunity to observe and hear the witnesses, will not be disturbed.

[Filed December 27, 1966]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WILLIS ATTOCKNIE, Plaintiff,	)	
vs.	)	CIVIL NO. 66-316
STEWART L. UDALL, SECRETARY OF THE INTERIOR Defendant.	)	

MEMORANDUM OPINION

The plaintiff, a Comanche Indian who alleges himself to be an illegitimate son, was disinherited by the last will and testament of Albert Attocknie, deceased Comanche Indian Allottee No. 532, by the following testamentary provision: "I leave nothing to Willis Attocknie because he is not my son." The Secretary of the Interior approved the will. Plaintiff brought this action for judicial review under Section 10 of the Administrative Procedure Act[1] seeking to have the decision of the Secretary set aside.

The averments of the complaint assign the customary reasons for the setting aside of an agency determination, namely that the Secretary's decision was arbitrary and capricious, that it represented an abuse of administrative discretion, that it was made in excess of statutory authority, is contrary to the evidence and law, and is violative of the due process provisions of the United States Constitution. The actual basis asserted for this action, however, is, according to the clear import of the complaint, that the decision complained of was contrary to the evidence and the

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[1] 60 Stat. 240 (1946), 5 U.S.C. § 1009.

law relating to the decedent's testamentary capacity at the time of the making of the will in that he was at that time suffering from an insane delusion as to the existence of his natural child and was thereby mentally incapable of making an effective will disposing of his property, and by reason thereof the will is void and the estate should be distributed according to the law of descent and distribution of the State of Oklahoma.

The decedent was the recipient of a Comanche Indian allotment made in accordance with the provisions of the General Allotment Act of February 8, 1887.[2] During his lifetime his allotted lands were, and continue at this time to be, held in trust by the United States in accordance with the provisions of that act. Additionally, he was the beneficial owner of other Indian lands, similarly allotted and held in trust, which he had acquired by inheritance. He died on December 5, 1962, leaving a will by which he devised all of his trust estate to his four legitimate children.

A hearing was held by a hearing examiner of the Department of the Interior on April 11, 1963, after due notice in accordance with the regulations of the Secretary,[3] for the purpose of ascertaining the heirs at law of the decedent and the facts and circumstances surrounding the execution of the last will and testament.[4] The complaint does not allege the existence of any procedural defects.

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[2] 24 Stat. 388. The act provides, *inter alia,* that the United States shall hold the lands in trust for the allottee during the existence of the trust period or any extension thereof, or, in case of his decease, for his heirs.

[3] The applicable regulations of the Secretary of the Interior are set out in Part 15 of 25 C.F.R. (1958 Ed.).

[4] The authority of the Secretary of the Interior to approve wills of Indians owning allotted lands is contained in the Act of June 25, 1910, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. § 373, which provides, in part, that any Indian, except members of the Five Civilized Tribes or of the Osage Tribe, over the age of twenty-one years having any right, title or interest in any In-

On May 3, 1963, the examiner, acting pursuant to delegated authority, entered his order approving the will and decreeing distribution of the estate in accordance with its provisions. In that order the examiner determined and found that: "The evidence shows that the will was prepared by a private attorney in or near Oklahoma City, at the home of the decedent's son, Francis Joseph Attocknie, and appears to meet all the requirements of the Department for a valid instrument. Both attesting witnesses testified that the will was properly made and executed by the decedent when he was of sound and disposing mind and memory and not acting under undue influence, fraud, duress or coercion. Willis Attocknie objected to the will on grounds of lack of mental capacity and possible undue influence. However, his evidence is insufficient to overcome the evidence offered in support of the will."

On July 2, 1963, the plaintiff filed a petition for rehearing, asserting as a basis therefor that the decedent was not of sufficient testamentary capacity on August 1, 1961, to make a valid last will and testament because he was at that time suffering from an "insane delusion" that the petitioner was not his son. Plaintiff's petition was granted and a rehearing was held on June 29, 1964. On January 29, 1965,

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[4] (Continued)

dian lands or moneys held in trust by the United States or restricted upon alienation shall have the right to dispose of such property by will in accordance with regulations to be prescribed by the Secretary of the Interior. It further provides that such a will shall not be valid nor have any force or effect unless it shall have been approved by the Secretary of the Interior; that the Secretary may approve or disapprove the will either before or after the death of the testator and where such a will has been approved and it is subsequently discovered that there was fraud in connection with the execution or procurement thereof, the Secretary of the Interior within one year after the death of the testator may cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the state wherein the property is located.

the hearing examiner entered an additional order which affirmed his original decision approving the will.

Thereafter, in accordance with the applicable regulations, the plaintiff appealed from the orders of the hearing examiner to the Secretary of the Interior. Faith Attocknie Blackowl and Paul Attocknie, children of the decedent and beneficiaries under the will, similarly appealed to the Secretary from those parts of the examiner's orders of May 3, 1963 and January 29, 1965 which found that the plaintiff, Willis Attocknie, was the decedent's illegitimate son. On February 7, 1966, pursuant to authority delegated to the Solicitor of the Department of the Interior and redelegated to the Associate Solicitor, a Departmental determination was made which affirmed the examiner's decisions approving the will and which dismissed the appeals. Plaintiff thereupon filed this action.

Both the defendant and the plaintiff appeared by motions for summary judgment. Both have presented supporting briefs. The defendant's motion is predicated primarily upon the proposition that this Court is without jurisdiction to set aside the decision of the Secretary for the reason that the actions taken were within the scope of his authority and are therefore final and conclusive. Plaintiff's motion is, in essence, based upon the contention that the evidence presented at the hearings required a finding that the decedent lacked testamentary capacity by reason of the existence of an insane delusion and, there being a lack of the requisite mental capacity to make a valid will, the Secretary is without power to grant it approval, and this Court must therefore set aside such approval. The contentions of the parties are in direct conflict with respect to whether or not the evidence adduced by the hearing examiner supported a finding that the decedent, on the date he made his will, was in fact suffering under the insane delusion which the plaintiff asserts existed.

A review of the hearing record compels the conclusion that the decedent and plaintiff's mother were never married. While there was conflicting testimony upon the question of plaintiff's paternity, the record contains considerable evidence to the effect that the decedent and plaintiff's mother consorted together frequently during the period of conception, and there is little in the record to indicate that plaintiff's mother consorted with any other man during that time. Based upon the record, the conclusion can be reached that the decedent was probably the plaintiff's father. The hearing examiner so found him to be. The record reflects that the proponents of the will highly disputed such finding. No issue has been raised in this action, however, as to the correctness or incorrectness of that finding. The examiner's conclusion, in which the Secretary's decision concurred, was that there was insufficient evidence in the record upon which to base a finding of the existence of the alleged insane delusion, and that, therefore, there was no lack of testamentary capacity.

This Court is not in agreement with the defendant's contention that the Secretary of the Interior's approval of an Indian will, when acting within the scope of his statutory authority, is final and conclusive so as to preclude judicial review. Admittedly there is authority for that view, as has been cited. In support of that position the defendant relies upon the rule enunciated in Hanson v. Hoffman, 113 F.2d 789 (10th Cir). 1940, and the decision cited therein. This Court prefers the view expressed in the later decision of Homovich v. Chapman, 191 F.2d 761 (D.C. Cir. 1951), wherein it was stated:

> "* * * The Secretary argues that, because Section 1 of the 1910 Act, dealing with the determination of the heirs of an Indian who dies without a will, provides that his determination 'shall be final and conclusive', therefore Section 2 of that Act, dealing with wills, must be read as though it contained a similar provision, al-

> though in fact it does not. We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so. The mere fact that the acts of the Secretary in providing regulations for the execution of these wills and in approving them, required the exercise of discretion and judgment on his part, does not preclude judicial review of his action. To be sure, if upon such review it appears that his action was within the scope of the authority conferred upon him, the court cannot disturb his decision. But that is a different rule from the rule of total non-reviewability. The Administrative Procedure Act (Section 10) forbids judicial review only where statutes 'preclude' such review or where agency action is 'by law committed to agency discretion.' No statute 'precludes' this review, and the Secretary would have us stretch the second prohibitory clause far beyond its meaning. * * *"

This Court agrees with the plaintiff that it has jurisdiction to review the determinations of the Secretary and his hearing examiner which approved the decedent's will in order to ascertain whether or not, based upon the whole record of the administrative proceedings, there existed a basis upon which those determinations could reasonably have been made.

I believe it to be a well settled rule that factual determinations by the Secretary of the Interior in administrative proceedings, in the absence of fraud, are conclusive when supported by substantial evidence. Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Noren v. Beck, 199 F.Supp. 708 (S.D. Cal. 1961). Therefore, the function of this Court is limited to a review of the administrative record relating

to the approval of the decedent's will in order to ascertain whether or not the Secretary and his hearing examiner could reasonably have reached a determination that the decedent was possessed of the necessary testamentary capacity to have made a valid will.

There can be no question of this Court substituting its determination for the discretionary authority of the Secretary, for this it clearly cannot do. The task of the reviewing court is not to guarantee the correctness of the administrative decision so long as the decision is supported by competent evidence based on the whole record. In other words, the only question this Court may answer on review is whether, on the record, the Secretary, acting through his delegated agents, could reasonably have made the findings and reach the conclusions which were made. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). This view is supported by Hayes v. Seaton, 270 F.2d 319, 321 (D.C. Cir. 1959), wherein the court said:

> "Since the Secretary's decision that the son survived the father was an essential part of the Secretary's 'final and conclusive' ascertainment of the son's legal heirs, it was a final and conclusive decision. It determined who took the son's property and also who took the father's property. We think it was final and conclusive for both these purposes. *Even if it were reviewable and in our opinion erroneous, we could not disturb it, for it was not arbitrary or unreasonable. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'* Rochester Telephone Corp. v. United States 1939, 307 U.S. 125, 146, 59 S.Ct. 754, 83 L.Ed. 1147." (Emphasis supplied.)

It has heretofore been pointed out that the authority of the Secretary of the Interior to approve Indian wills is

contained in 25 U.S.C. § 373.[5] The statute permits an Indian to dispose of his trust or restricted property by will in accordance with regulations to be prescribed by the Secretary of the Interior. The Secretary has provided such regulations. Of particular pertinence to the question now under consideration is 25 CFR 15.12, the provisions of which are as follows:

> "No action shall be taken on the will of a deceased Indian until testimony shall have been taken as to the testamentary capacity of the decedent to execute the will and as to the circumstances surrounding its execution. A reasonable effort shall be made to procure the testimony of the attesting witnesses to the will; or, if their testimony is not reasonably available, an effort shall be made to identify their signatures through other evidence."

Also of significance to this inquiry is 25 CFR 15.28(a), which provides as follows:

> "(a) An Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses."

Thus it can be seen that the Secretary of the Interior, by his own probate regulations, has prescribed the requirement that there must be testamentary capacity. Under those regulations an Indian will is not subject to secretarial approval where a finding has been made of a lack of such capacity. The decedent, Albert Attocknie, was not found by the hearing examiner to have lacked that requisite testamentary capacity at the time he made the will upon which the administrative determination was made, and that finding

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[5] Act of June 25, 1910, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678.

was affirmed upon appeal to the Secretary. Plaintiff contends that the decedent's testamentary provision that "I leave nothing to Willis Attocknie because he is not my son" conclusively proves, on its face, that the decedent was possessed of an insane delusion and therefore could not have been found, under the decisions of the Oklahoma Supreme Court and other authority, to have been of testamentary capacity. Under the plaintiff's theory, once the hearing examiner had made a finding that the plaintiff was the decedent's illegitimate son, a rule somewhat similar to the tort doctrine of res ipsa loquiter automatically applies in circumstances where the decedent had included a statement in his will by which he denied plaintiff's paternity. Counsel has not cited, nor has this Court been able to find, authority for the application of such a narrow rule.

An insane delusion was defined by the Supreme Court of Oklahoma in the case of Winn v. Dolezal, 355 P.2d 859, 861 (1960), as follows:

> "An 'insane delusion', within rule invalidating will, denotes a false belief, which would be incredible in the same circumstances to victim thereof were he of sound mind and from which he cannot be dissuaded by any evidence or argument."

Plaintiff contends that the application of the foregoing definition to the circumstances surrounding the execution of decedent's will, coupled with the testimony of witnesses to the effect that the decedent had recognized and treated the plaintiff as a son over a long period of time, compelled an administrative finding of the existence of the alleged insane delusion.

In commenting upon the foregoing definition in his finding and order, the hearing examiner stated:

> "Nothing could be clearer or simpler than this rule; an insane delusion is not merely an erroneous belief. The belief must not only be wrong, it must be unreason-

able. It must defy rational explanation or justification. Stated another way, it must be such that only a person with a deranged or abnormal mind would believe that the 'insane delusion' represented the truth or was correct.

"In reality, the petitioner's entire case rests on only the following language in the will: 'I am leaving nothing to Willis Attocknie because he is not my son', plus the original findings in these proceedings that Willis Attocknie, Sr. was a son of the testator. After an extensive rehearing, no evidence has been found which sheds any additional light on this question. While the petitioner attempted to shift the burden of proof to the proponents of the will to explain a purported change of attitude by the testator, this added nothing to his objection to the will. The undersigned does not know, and is not interested in determining if the decedent's views changed during his life on this paternity question. It is immaterial and, does not, in any way, reflect adversely on the decedent's mental capacity, or suggest that he was suffering from an insane delusion. In the absence of proof of a recognized marriage between the parents of Willis Attocknie, Sr., there are no presumptions of paternity involved here. The decedent was free to change his views any number of times on this paternity question for a multitude of reasons which would be plausible, reasonable and understandable. Thus, proof of a change of attitude is not even evidence of an insane delusion.

"Further, it is equally absurd to suggest that the inconsistency between the language in the will and the original findings of fact tends to prove an 'insane delusion.' If all of the evidence had been clear and unequivocal that Willis Attocknie, Sr. was the decedent's son, this might cause one to look more carefully at the reasons for the testator's views. However, this is not

the case, the original findings of paternity are based on highly disputed evidence, and there were a substantial number of witnesses who did not believe that this relationship existed. A finding that the petitioner was not a son of this decedent could, in my opinion, be sustained by the evidence now in the record. Under these circumstances the petitioner has failed to prove the first basic element of an 'insane delusion.' He has failed to establish a false belief. When, as in this case, there is good reason for an honest difference of opinion on facts that are extremely difficult to establish, no single conclusions by any one person is sufficient to hold that opposing views are 'false.' There are innumerable reasons which are logical, understandable and sensible for the testator's beliefs as to the paternity of Willis Attocknie, Sr.

"If, as indicated above, the petitioner has completely failed to prove that the testator's belief was false, there seems to be no useful purpose in exploring the possibility that it was the product of an unsound mind. There is no other evidence whatsoever of lack of mental capacity to make a will at the time this instrument was executed. The evidence, taken in its entirety, fails to even suggest mental abnormality or an insane delusion."

The Supreme Court of Oklahoma, in Robertson v. Robertson, 189 P. 2d 615 (1948), found the existence of an insane delusion based upon a statement contained in the decedent's will denying paternity of certain of his children. The question presented in that decision is not analagous to the question considered by the Secretary for at least two reasons. First, the children were born during a valid, recognized and undisputed marriage between the parents. Second, and more important, no one other than the decedent ever seriously questioned the paternity. The court stated with respect to the evidence in that regard that "all the

evidence is that Dean Robertson and Helen Pope are the children of the marriage between testator and his first wife, Elizabeth."

Plaintiff's brief in support of his motion for summary judgment places considerable emphasis upon the decision of the Oklahoma Supreme Court in the case of Winn v. Dolezal, *supra*. In that case there was a sound basis for the testator's belief that the children referred to were not his. On page 862 the court said:

> "There was also testimony that testator had stated his wife told him at the time of the divorce that Rudolph, Edward and Evelyn (the contestants) were not his children but that Clarence was the only child fathered by him."

Plaintiff suggests that it would be difficult to imagine a more persuasive source of a denial of paternity than the words of the natural mother. Again, the factual situation presented in that case is dissimilar from the factual situation which the Secretary was obliged to decide because the children were born to the parents during wedlock and therefore are presumed to be the lawful issue of the husband and wife.

The circumstances surrounding the denial of paternity by Albert Attocknie in the matter now under consideration are entirely different. The decedent and plaintiff's mother were never married. Counsel has not cited, nor has this court been able to find, any decisions or other authority for holding that an affirmative denial of paternity by a putative father of an illegitimate child evidences the existence of an insane delusion. There is some evidence in the record that Albert Attocknie's views had changed over the years as to his paternity of the plaintiff. If there is a rational explanation for the testator's views on that question, then, even under the rule of both the Winn and the Robertson decisions, those views, standing alone, are not conclusive evidence of an insane delusion.

Based on the simplest and most logical assumption of facts, this court could suggest numerous reasons why he might have acknowledged or denied paternity at any time over the years. The birth having been an illegitimate one, it is quite possible that no one, including the mother of the plaintiff, was absolutely certain as to the identity of the father. The mother was never bound by any vows of fidelity to the decedent. Under such conditions, it would be just as logical to assume that the hearing examiner was suffering from an insane delusion in finding that the plaintiff was this decedent's son as it would be to assume that the testator was suffering from an insane delusion because he did not share that conclusion. The examiner's findings as to the paternity of a child born out of wedlock creates no presumption that such conclusion is either correct or is universally shared, or that it was shared by the putative father. Under such circumstances there always exists some element of doubt.

Plaintiff additionally contends that 25 U.S.C. § 371[6] requires that an illegitimate Indian child must be recognized as the heir of its natural father. This court is unable to arrive at that interpretation. The purpose of the statute is to legitimate the children of Indian parents who have cohabitated together as husband and wife according to the custom and manner of Indian life, under circumstances where there has been no valid marriage consummated under appropriate law.

There is a presumption of validity which accompanies every last will and testament. After having reviewed the administrative record, being mindful of the factual situation as it existed with respect to the relationship of the plaintiff and the decedent, and upon consideration of all the testimony which was taken by the hearing examiner, this

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[6] Act of February 28, 1891, 26 Stat. 795.

Court must hold that there was substantial evidence that the testator was, at the time the will was executed, of sound mind and disposing memory, that such evidence was sufficient to support an administrative determination that there was no lack of testamentary capacity, that the decedent's denial of paternity of a child born out of wedlock is not sufficient, standing alone, to prove the existence of an insane delusion, and that the plaintiff had failed to overcome the presumption of the validity of the will. This Court must therefore hold that the administrative decision was based upon substantial evidence and accordingly cannot be said to have been arbitrary or capricious.

Lastly, the plaintiff alleges the testator to have been subject to undue influence at the time the will was executed. Considered in its best light, the evidence to that effect is largely circumstantial and is insufficient to overcome the presumption that the will is valid.

I find, and hold accordingly, that the complaint here fails to state a claim on which relief can be granted, and that it cannot be amended to state a claim upon which relief can be granted. The motion of plaintiff is denied, and the complaint and the action are dismissed with prejudice.

Judgment to that effect will be entered.

Dated this 24th day of December, 1966.

(signed) Luther B. Eubanks

Luther B. Eubanks
United States District Judge

[APPENDIX]

[Filed January 20, 1967]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Willis Attocknie, Plaintiff,	)	
-vs-	)	CIVIL NO. 66-316
Stewart L. Udall, Secretary of the Interior, Defendant.	)	

JUDGMENT

This matter came on for consideration of the Court upon the Motion for Summary Judgment of the plaintiff filed herein and upon the Motion for Summary Judgment of the defendants filed herein. The Court after having heard argument of counsel, having reviewed the file and being otherwise fully advised in the premises is of the opinion that the Motion for Summary Judgment of the plaintiff should be overruled and that the Motion for Summary Judgment of the defendant should be sustained in accordance with the memorandum opinion and the findings of fact and conclusions of law of the Court filed with the Clerk of this Court on December 27, 1966;

IT IS THEREFORE ORDERED that the Motion for Summary Judgment of the plaintiff be, and the same is, hereby overruled and that the Motion for Summary Judgment of the defendant be, and is, hereby sustained and this cause dismissed.

(signed) Luther B. Eubanks

UNITED STATES DISTRICT JUDGE

Approved:

B. ANDREW POTTER
United States Attorney

/s/ Robert L. Berry
ROBERT L. BERRY
Assistant United States Attorney

Durward K. McDaniel,
Attorney for Plaintiff.
/s/ Durward K. McDaniel

JUDGMENT ENTERED
IN CIVIL DOCKET ON
JAN 20 1967
/s/ Adelaide Holston,
Deputy.

[Filed March 14, 1968]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 9391 — FEBRUARY 1968 TERM

WILLIS ATTOCKNIE, Appellant, v. STEWART L. UDALL, SECRETARY OF THE INTERIOR, Appellee.	Appeal From The United States District Court For The Western District of Oklahoma.

Durward McDaniel, Oklahoma City, Okla. (David Cobb, Washington, D.C., and Darrell Winings, Oklahoma City, Okla., with him on the Brief), for Appellant.

Frank B. Friedman, Attorney, Department of Justice (J. Edward Williams, Acting Assistant Attorney General, B. Andrew Potter, United States Attorney, Robert L. Berry,

Assistant United States Attorney, and Roger P. Marquis, Attorney, Department of Justice, with him on the Brief), for Appellee.

Before HILL and SETH, Circuit Judges, and DOYLE, District Judge.

SETH, Circuit Judge.

The appellant is a Comanche Indian who seeks judicial relief from certain determinations by the Secretary of the Interior relative to the last will and testament of Albert Attocknie, a deceased Comanche Indian allottee.

The petitioner, in the administrative proceedings, contested the approval of the decedent's will on the ground that the decedent was not competent, and was suffering at the time the will was executed from an insane delusion as to his relationship to the petitioner. The Examiner of Inheritance approved the will, and his findings and conclusions were approved by the Secretary.

Appellant filed a complaint in the United States District Court seeking a review of the administrative decisions. An answer was filed by the United States, and thereafter both parties filed motions for summary judgment in the United States District Court. The court found that the orders of the Secretary were supported by the record, were not arbitrary nor capricious, and dismissed the action.

The Secretary asserted before the trial court that the determinations made by him were final, and were not subject to judicial review. Reliance is placed in his argument on the wording of 25 U.S.C. §§ 372 and 373, and the Secretary further asserted that the Administrative Procedure Act does not permit the review sought by the petitioner.

The record shows that the decedent at the time of his death was a member of the Comanche Tribe who held a

trust allotment and was also the beneficial owner of other allotted trust lands which he had received by inheritance. The will in question purported to dispose of this trust property by devising it in equal shares to four named children of his, but not including the petitioner. The will contained a provision referring to the petitioner which reads as follows: "I leave nothing to Willis Attocknie because he is not my son."

The Examiner of Inheritance, at the conclusion of his hearing, determined that there had been no showing made that the decedent was not competent, and also found that appellant was the illegitimate son of the decedent. This was appealed to the Secretary by the petitioner, but it was upheld. The hearing held by the Examiner was called for the purpose of ascertaining the heirs at law of the decedent and to determine the facts and circumstances surrounding the execution of the will. The regulations of the Department pertaining to wills, and adopted pursuant to 25 U.S.C. § 373, require a consideration of the competency of a testator.

Following the Secretary's order approving the will, petitioner commenced this action in the United States District Court by a complaint which recites that it is filed pursuant to "5 U.S.C. 1009." This provision of the Administrative Procedure Act now appears as 5 U.S.C. § 701. The statutory provisions relating to the heirship and wills of the members of certain Indian Tribes, including that of the decedent, are contained in 25 U.S.C. §§ 372-73. These provisions concern only the heirship and wills of certain deceased Indians who hold trust allotments at the time of their deaths. Section one [§ 372] provides for the determination of heirship of such Indians who die intestate, and it states specifically that the decision of the Secretary of the Interior in ascertaining the heirship of such a decedent "shall be final and conclusive." The second section [§ 373] states that such Indian owners of trust allotments shall have the right during the trust period to dispose of such property by will

in accordance with the regulations of the Secretary of the Interior. This section also provides that no will "so executed" shall be valid until it shall have been approved by the Secretary, and approval or disapproval may take place either before or after the testator's death. The disposition of the trust property by such an approved will does not alter the trust character of the property. The second section [§ 373] does not contain a statement, comparable to that contained in the first section, to the effect that the decision of the Secretary shall be final and conclusive. The case before us concerns action by the Secretary taken pursuant to an issue arising under section 373.

The Secretary asserts that there can be no judicial review of the determination of heirship under section one [25 U.S.C. § 372] by the express wording thereof, and that Congress likewise intended that there be no review under section two [25 U.S.C. § 373] by reason of the fact that the two sections are so closely related and both concern the management and policies of the Secretary relating to trust property. Thus the Secretary here argues that the two sections should be construed as one on the review issue.

We are here only concerned with judicial review as it relates to orders of the Secretary of the Interior issued pursuant to 25 U.S.C. §§ 372 and 373, and particularly § 373, although the appellee urges strongly a broader consideration.

This court in Heffelman v. Udall, 378 F.2d 109 (10th Cir.), had before it an administrative decision that the petitioner was not the common law husband of a decedent who had left a will making provision that her "husband" was to receive a fraction of her estate. The court there noted that it was clear there could be no judicial review of a determination of heirship in the absence of a will, and that the mere existence of a will did not thereby make the administrative proceeding subject to judicial review. This court in the cited case said:

> ". . . [S]ections 1 and 2 of the Act of 1910 [25 U.S.C. §§ 372-73] should be viewed as complementing each other with respect to the finality of the administrative determination of facts. We accordingly conclude that such a determination comes within the jurisdictional exception stated in section 10 of the Administrative Procedure Act."

The court thus held that judicial review of the administrative decision relating to the distribution of the Indian's allotted trust estate was not permitted under the Administrative Procedure Act, and also held there was no jurisdiction under statutes relating to the federal question, mandamus, or declaratory judgments.

The decision of this court in Heffelman v. Udall, supra, is controlling here, and it precludes the review sought by the petitioner in this proceeding.

The case is REVERSED and is remanded to the District Court with directions that the complaint and the cause be dismissed for lack of jurisdiction.

LIBRARY
SUPREME COURT, U. S.

No. 185

FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIS ATTOCKNIE, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. xxxi-xxxv) is reported at 390 F.2d 636. The opinion of the district court (Pet. App. xvi-xxix) is reported at 261 F.Supp. 876. The administrative decision, which became the Secretary of the Interior's final order (Pet. App. xii-xv), is not reported.

JURISDICTION

The judgment of the court of appeals was filed on March 14, 1968. The petition for a writ of certiorari

was filed on June 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior's approval of the will of an Indian as specifically authorized by statute may be overturned by the court.

STATUTE INVOLVED

The Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 373, provides:

> Sec. 2. Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one

year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: * * *.

STATEMENT

Albert Attocknie, a Comanche Indian, died leaving a restricted estate consisting of certain alloted lands (Pet. App. xvii). Under a will dated August 1, 1961, approved by the Department of the Interior, Albert Attocknie devised and bequeathed his estate to his four legitimate children (Pet. App. xvii, xii). The will also contained the following provision: "I leave nothing to Willis Attocknie because he is not my son" (Pet. App. xii).

Petitioner claimed that the decedent did not have sufficient testamentary capacity to execute a will on August 1, 1961, because at that time he was suffering from an "insane delusion" that petitioner was not his son (Pet. App. vii). After hearing conflicting evidence, the Bureau of Indian Affairs' hearing examiner approved the will, finding that there had been no showing made that the decedent was incompetent (Pet. App. x). The examiner also found that the petitioner was the illegitimate son of the decedent (Pet. App. viii). In departmental proceedings, that decision was affirmed (Pet. App. xii-xv). Petitioner then commenced this action, requesting that the Secretary's decision be set aside and that the estate be distributed in accordance with the laws of descent and distribution of the State of Oklahoma (Pet. App.

xvii). The judgment of the district court, dismissing the complaint on the merits (Pet. App. xxx), was reversed by the court of appeals, with directions to dismiss for lack of jurisdiction on the ground that, under Section 2 of the 1910 Act, *supra*, the departmental decision was not subject to judicial re-examination (Pet. App. xxxiv-xxxv).

ARGUMENT

The decision below rests upon the unquestioned authority of the Secretary of the Interior to supervise the distribution of Indian estates pursuant to 25 U.S.C. 372-373. The critical holding is that the Secretary's approval of the Indian will involved here is not subject to be overturned by the courts. While the opinion below states the rule of non-reviewability in broad terms—correctly we believe—the application of the rule in this case presents no conflict with decisions of this Court or of the Court of Appeals for the District of Columbia.

Indeed, the Secretary's decision here turns on a determination of fact: that the testator was not suffering an "insane delusion" in believing that petitioner was not his son. No court has held that the judicial function—whatever its limits in other respects—includes authority to re-examine that kind of finding. Plainly, *Blanset* v. *Cardin*, 256 U.S. 319, which merely construed 25 U.S.C. 373 as overriding State law, is not in point. Nor is *Homovich* v. *Chapman*, 191 F.2d 761 (C.A.D.C.) to the contrary. While the Court of Appeals for the District of Columbia there ex-

pressed the view that the Secretary's actions under Section 373 are judicially reviewable in some circumstances (and is to that extent apparently in disagreement with the court below), the opinion expressly holds that when the Secretary's determination is "within the scope of the authority conferred upon him, the court cannot disturb his decision." *Id.* at 764. That rule, reiterated more recently in *Hayes* v. *Seaton*, 270 F.2d 319 (C.A.D.C.),[1] would effectively preclude review here.

We question whether the scope of the judicial authority in reviewing determinations of the Secretary of the Interior under 25 U.S.C. 373 is a matter that presses for authoritative decision by this Court. But, at all events, the decision below—correct by any standard—does not appear to be an appropriate vehicle for that purpose.

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[1] See, also, the *per curiam* order in *Asenap* v. *Huff*, 312 F.2d 358 (C.A.D.C.), directing the district court to enter summary judgment in favor of the Secretary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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